



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION
Case #: FTI - 204270

PRELIMINARY RECITALS

Pursuant to a petition filed on January 27, 2022, under Wis. Stat. § 49.85(4), and Wis. Admin. Code §§ HA 3.03(1), (3), to review a decision by the Brown County Human Services regarding FoodShare benefits (FS), a hearing was held on February 15, 2022, by telephone. The hearing record was held open through February 25, 2022 for additional evidence from petitioner. He submitted documents on February 21, 2022 that were included in the record.

The issues for determination are whether petitioner's appeal of the April 15, 2021 overpayment determination (claim [REDACTED]) was filed timely; whether the agency correctly determined the overpayment and is entitled to recoup it; and whether petitioner's appeal of the September 17, 2021 tax intercept determination was filed timely.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, WI 53703

By: [REDACTED]
Brown County Human Services
Economic Support-2nd Floor
111 N. Jefferson St.
Green Bay, WI 54301

ADMINISTRATIVE LAW JUDGE:

Beth Whitaker
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of California who resided in Brown County while receiving FS.
2. In February 2017, petitioner participated in a FS review and did not report earned income.
3. On July 17, 2017, petitioner reported that he was self-employed and submitted SE Income Forms to the agency.
4. In August, 2017 the agency received a SWICA wage match showing wages for petitioner from [REDACTED] aka [REDACTED], that petitioner did not report. After verifying the wages, the agency closed petitioner's FS case.
5. On August 25, 2017, petitioner contacted the agency by telephone and stated that he never worked at [REDACTED]. He was instructed to provide proof.
6. On February 6, 2018, petitioner informed the agency that someone was using his identity and that the SWICA wages associated with his identity were not his. He was instructed to provide proof.
7. On April 1, 2021, petitioner filed a report with the [REDACTED] California Sheriff's Department (file TS [REDACTED]) alleging unlawful use of personal identification information, beginning November 5, 2015 at [REDACTED], Green Bay, Wisconsin.
8. On April 15, 2021, the agency issued to petitioner a FoodShare Overpayment Notice, informing him that he was not eligible for the FS benefits he received from March 1 2017 to May 31, 2017, in the amount of \$582 (claim [REDACTED]), for failure to report earned income due to client error. The notice was mailed to him at [REDACTED], c/o [REDACTED] [REDACTED]. The deadline to appeal the determination was July 14, 2021.
9. On April 19, 2021, petitioner filed fraud reports with Green Bay Police Department (case [REDACTED]) but failed to follow through with information needed to complete the investigation.
10. On May 4, 2021, the agency mailed to petitioner a FoodShare Repayment Agreement, instructing him that he must repay the balance, \$582, or complete and return the repayment agreement by May 25, 2021. The notice was mailed to him at [REDACTED] [REDACTED].
11. On May 7, 2021, petitioner completed a form entitled Identity Theft Victim's Complaint and Affidavit, providing his identity information and stating that he believed his sister [REDACTED] aka [REDACTED], used his identity information to commit fraud. The form was signed and notarized and submitted to the [REDACTED] Sheriff's Office.
12. On June 2, 2021, July 2, 2021 and August 3, 2021, the agency issued to petitioner dunning notices regarding the FS overpayment debt. The notices were mailed to him at [REDACTED] [REDACTED].
13. On September 17, 2021, the agency issued to petitioner a state tax refund and credits intercept notice, informing him that it may recoup the FS overpayment by intercepting his state tax refunds and/or credits due now or in the future. The notice was mailed to [REDACTED] [REDACTED]. The appeal deadline was 30 days later, on October 17, 2021.
14. On Jan 12, 2022 petitioner contacted the agency by telephone and reported to the supervisor that the [REDACTED] wages were related to identity theft.
15. On January 27, 2022, the Division received petitioner's request for hearing by fax.

DISCUSSION

State FS agencies must “establish a claim against any household that has received more [FS] benefits than it is entitled to receive.” 7 CFR § 273.18(a). An appeal of a FS overpayment must be filed within 90 days of the date of that action. 7 C.F.R.. § 273.15(g); Wis. Admin. Code §§HA 3.05(3)(a) and 3.03(3)

The Division of Hearings and Appeals (“Division”) has authority to review the merits of an appeal only if there is jurisdiction to do so. The Division lacks jurisdiction to address the merits of a case when the appeal is not timely filed. The deadline to appeal the FS overpayment determination was July 14, 2021. Petitioner’s appeal was filed on January 27, 2022. Petitioner’s appeal was filed over six months late. The tax intercept notice was issued on September 17, 2021 and the appeal period was 30 days, making October 17, 2021 the deadline to appeal. Petitioner’s January 27, 2022 appeal was filed over three months late.

Petitioner’s position is that his late appeals should be heard because the agency sent the notices to an address that was not his because someone fraudulently used his identity. His argument regarding timeliness is inextricably related to his dispute of the overpayment itself and, indirectly, the tax intercept action based on the overpayment determination. He testified that he did not work at [REDACTED] and that he believed someone stole his identity and worked at [REDACTED] using his name and social security number.

The April 15, 2021 overpayment notice was mailed to petitioner at [REDACTED], c/o [REDACTED] [REDACTED]. He testified that this was his address at one time while he lived in Wisconsin and received FS, however, he moved to California at the end of 2018 and did not receive the notice.

The agency sent the notice to the address it had on file which is the same address petitioner confirmed as a past Wisconsin address. The notices were not returned to the agency as undelivered or undeliverable. The notice, once correctly mailed, is presumed delivered and received. To overcome that presumption, petitioner must present evidence demonstrating that the notice was not actually received. This interpretation is confirmed by the following Wisconsin case law:

It is well established that the mailing of a letter creates a presumption that the letter was delivered and received. See, *Nack v. State*, 189 Wis. 633, 636, 208 N.W. 487(1926), (citing *Wigmore, Evidence* 2d. ed.) § 2153; 1 *Wigmore, Evidence* (2nd ed.) § 95) *Mullen v. Braatz*, 179 Wis. 2d 749, 753, 508 N.W.2d 446(Ct.App.1993); *Solberg v. Sec. Of Dept of Health & Human Services*, 583 F.Supp. 1095, 1097 (E.D.Wis.1984); *Hagner v. United States*, 285 U.S. 427, 430, 52. S.Ct. 417, 418(1932).

*** (Portions of discussion not relevant here omitted)

This evidence raises a rebuttable presumption which merely shifts to the challenging party the burden of presenting credible evidence of non-receipt. *United States v. Freeman*, 402 F.Supp. 1080, 1082(E.D.Wis.1975). Such a presumption may not, however, be given conclusive effect without violating the due process clause. *United States v. Bowen*, 414 F.2d 1268, 1273(3d.Cir.1969); *Mullen v. Braatz*, 179 Wis. 2d at 453. If the defendant denies receipt of the mailing, the presumption is spent and a question of fact is raised. (Examiner note: Citations omitted here.) The issue is then one

of credibility for the factfinder. The factfinder may believe the denial of receipt, or the factfinder may disbelieve the denial of receipt.

See State ex. Rel. Flores v. State, 183 Wis.2d 587, at 612-3 (1994)

Petitioner testified credibly that he did not receive the overpayment notice. Two weeks before the notice was issued, he filed a law enforcement report in California, reporting a California address that was the same address he reported to the agency in January 2022 and was his address at the time of hearing. There is no evidence that whoever resided at the Imperial Lane address forwarded the notice or made petitioner aware of it. I find that the petitioner rebutted the presumption of receipt and delivery. He did not receive the April 15, 2021 overpayment notice. It is the Division's longstanding position that the absence of receipt of the notice tolls the time limit for appeal. The appeal deadline stated in the notice has no effect and petitioner's appeal is considered timely.

The agency based the overpayment on a SWICA wage match showing wages for petitioner from [REDACTED] in Green Bay, Wisconsin. The wages were verified by the employer. If the wages are correctly associated with petitioner, it is not disputed that he was over the income limit and ineligible for FS for the period from March 1, 2017 to May 31, 2017. Petitioner first asserted that he did not work at [REDACTED] on August 25, 2017, when he contacted the agency by telephone shortly after his FS benefits were terminated, to state that he never worked at [REDACTED]. He was instructed to provide proof. Again on February 8, 2018, he asserted the same thing and was instructed to provide proof. It was suggested to him that he either file a law enforcement report or contact the employer. He testified at hearing that he called [REDACTED] in 2017 to ask them to correct the matter, but that the employer failed to do anything. He did not file a report with law enforcement at that time. He did not in any way provide the agency with evidence that the wages were fraudulently or incorrectly attributed to him.

Nothing happened relevant to this dispute until April 1, 2021, when petitioner filed a law enforcement report in California alleging identity theft. He did not report to the California agency that someone worked at any employer using his identifying information. This report was apparently prompted by his learning of an unpaid utility bill he was being held responsible for. He complained only about utility bills for the period from Nov 5, 2015 to Feb 2, 2016 at [REDACTED], Wis. from Wisconsin Public Service that on March 30, 2021 he learned had been sent to collections.

He stated in an affidavit to the California agency that he thought his sister, whom he identified by name, committed the fraud. The [REDACTED] California Sheriff's Office identified its role as assisting the Green Bay Police Department, forwarded the complaint to them and did no investigation. On April 19, 2021, petitioner filed fraud reports with Green Bay Police Department (case [REDACTED]) but failed to follow through with information needed to complete the investigation. Petitioner's documentary evidence at hearing amounted to reports showing that he asserted identity theft but no evidence of an investigation or other evidence that identify theft was found, regarding anything, and certainly no evidence to show that someone other than petitioner earned the wages the employer [REDACTED] reported for him. There is no evidence that [REDACTED] had a motive to fabricate wage reports or that it made an error in this instance. Petitioner has consistently claimed over a period of several years that he didn't work at [REDACTED] however, the agency cannot be expected to disregard employer-reported wages based on petitioner's mere assertion. Given that the fraud was associated with a series of physical addresses in Green Bay and that petitioner named his own sister as a suspect, it is likely that a law enforcement investigation would yield some conclusions about the veracity of his claim. No such information was presented by petitioner. The agency's contact with the Green Bay Police Department did not produce evidence to support petitioner's claim.

Petitioner failed to show that the wages that resulted in the overpayment were incorrectly attributed to him. The agency correctly relied on the employer's SWICA report and verification of petitioner's wages. No other error in the overpayment determination was alleged and I found none. The agency correctly determined that petitioner failed to report earned income over the program limit and was not eligible for the FS he received from March 2017 to May 2017.

Petitioner also seeks to appeal the tax intercept action. The notice was issued on September 17, 2021, the appeal deadline was October 17, 2021 and petitioner did not appeal it until January 27, 2022. The notice was mailed to [REDACTED]. Petitioner denied receiving it. He testified that he lived in Wisconsin through mid-2018 and that his last Wisconsin address was [REDACTED], Green Bay, Wisconsin. This is inconsistent with the information he provided to [REDACTED], Sheriff's Department in April and May 2021, when he said that he lived in Wisconsin from 2012 to 2018 and lived at [REDACTED], Green Bay, Wisconsin, however, he reported moving to [REDACTED], California in February 2019. There is no evidence to the contrary. It is undisputed that he has lived there between April 2021 and the date of hearing, therefore during the period that all notices related to the tax intercept were sent.

The agency began using the [REDACTED], Green Bay address based on a new hire match for petitioner's social security number associating him with that address. The first notice sent to petitioner at that address was a notice on May 4, 2021. This was three days before petitioner signed an affidavit regarding identity theft in which neither the wage issue nor the [REDACTED] address were mentioned. Petitioner denied any knowledge of that address and denied receiving any notice sent to him at that address, including the tax intercept notice. The notice was not returned to the agency, however, petitioner lived in another state and there is no evidence that he received the notice. His appeal is considered timely.

Wis. Stat. § 49.85, provides that the Wisconsin Department of Health Services shall, at least annually, certify to the Wisconsin Department of Revenue the amounts that it has determined that it may recover resulting from overpayments of general relief benefits, Food Stamps, AFDC and/or Medical Assistance payments previously made incorrectly.

The State of Wisconsin Public Assistance Collections Unit uses tax intercept from both state and federal tax refunds to recover overpayments from anyone who has become delinquent in repayment of an overissuance. A person who executes a repayment agreement may not be subject to tax intercept as long as s/he is meeting the conditions of the agreement. Additionally, to pursue a tax intercept, the liable party must have received three or more dunning notices. FoodShare Handbook § 7.3.2.10. If a person has received three dunning notices, s/he is subject to both tax intercept and monthly repayment. FoodShare Handbook § 7.3.2.12.

Petitioner established that he did not receive tax intercept notice mailed to him at [REDACTED], Green Bay, Wisconsin because he resided in California. (He also did not receive the dunning notices.) Because petitioner did not have notice of the tax intercept action, the agency is not entitled to rely on intercept of petitioner's tax refunds and credits to recoup the FS overpayment.

CONCLUSIONS OF LAW

- 1) Petitioner's January 27, 2022 appeal of the overpayment determination is deemed timely filed because he did not receive notice of the overpayment or his appeal rights.
- 2) The agency correctly relied on employer-verified wage information as a basis for concluding that petitioner failed to report earned income as described. It correctly determined the overpayment.

Petitioner is liable for an overpayment of FS benefits in the amount of \$582 for the period from March 1, 2017 to May 31, 2018 (claim [REDACTED]).

- 3) Petitioner's January 27, 2022 appeal of the September 17, 2021 tax intercept notice is deemed timely because he did not receive notice of the tax intercept action or his appeal rights.
- 4) The agency failed to provide the required notice of tax intercept and therefore incorrectly certified the amount for intercept from petitioner's state tax refund and/or credits. The agency was not entitled to use intercept of petitioner's tax refunds and/or credits to recoup the FS overpayment.

THEREFORE, it is

ORDERED

- 1) That petitioner's appeal of the overpayment is dismissed.
- 2) Regarding the tax intercept action, that the matter is remanded to the agency with instructions to return and reimburse any funds intercepted from petitioner's income tax refund(s) and/or credits and to send a notice of tax intercept to petitioner at his last known address 30 days before any future certification. These actions shall be completed within ten days of the date of this decision.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 4822 Madison Yards Way, 5th Floor North, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

APPEAL TO COURT

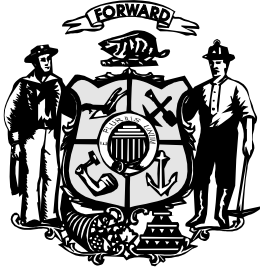
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 23rd day of February, 2022

s _____

Beth Whitaker
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on February 23, 2022.

Brown County Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability